IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

B.H., a minor, by and through her mother, JENNIFER HAWK, and K.M., a minor, by and through her mother, AMY MCDONALD-MARTINEZ,	**No. 10-cv- 6283**
Plaintiffs,	
v.	**ELECTRONICALLY FILED**
EASTON AREA SCHOOL DISTRICT,	
Defendant	

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

1. This case was brought by two middle school students who seek to overturn their school's ban on their breast cancer awareness bracelets. After an evidentiary hearing and argument, it appears that there are few material facts, if any, in dispute.

The Parties and their Bracelets

2. B.H. is a thirteen-year-old eighth grader at Easton Area Middle School in the Easton Area School District. (Notes of Testimony, Evidentiary Hr'g, Dec. 16, 2010 (hereinafter "N.T.") at 22:4-5.)

3. K.M. is a twelve-year-old seventh grader at Easton Area Middle School in the Easton Area School District. (Compl. ¶ 6; Answer ¶ 6.)

4. Defendant Easton Area School District ("EASD") is a political subdivision of the Commonwealth of Pennsylvania. (Compl. ¶ 7; Answer ¶ 7.)

5. Easton Area Middle School ("EAMS" or "the Middle School") is a large complex that holds two separate schools: the fifth and sixth graders have a separate entrance, separate classrooms and separate lunchrooms from the seventh and eighth graders. Plaintiffs attend classes in the EAMS 7-8 Building. (Compl. ¶ 8; Answer ¶ 8.) The building has three principals: Mr. Viglianti, the seventh grade assistant principal; Ms. Braxmeier, the eighth grade assistant principal; and Ms. DiVietro, the head principal of the 7-8 building, to whom Mr. Viglianti and Ms. Braxmeier report. (N.T. 153:9-18.)

6. The bracelets at issue are bands of colored rubber. The outside of the bracelets bear slogans including "i ♥ boobies! (KEEP A BREAST)", "check y♥ur self!! (KEEP A BREAST)", "KEEP A BREAST", "KAB", "Glamour Kills", and "boobies!". The inside of some bracelets contains the text "keep-a-breast.org" in large font with "art. education. awareness. action." printed below the webpage address, and the inside of other bracelets contains the text: "keep-a-breast.org", "glamourkills.com", and "(KEEP A BREAST)".[1]

7. The bracelets are distributed by the Keep A Breast Foundation, a 501(c)(3) nonprofit organization. The Foundation's mission is to help eradicate breast cancer by educating young people on methods of prevention, early detection, and support. The Keep A Breast Foundation operates many different youth-oriented breast cancer education programs and

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[1] Pls.' Ex. 39; Pls.' Ex. 40; Pls.' Ex. 41; *see also* N.T. 23:11-14, 28:5-19, 62:9-63:6, 74:22-75:10.l

campaigns.[2] The Foundation prides itself on the fact that its programming – which is aimed at girls and women up to thirty years of age – reaches "a demographic that other breast cancer non-profits do not touch."[3] Among other goals, the Foundation seeks to empower young women to take charge of their breast health and to be able to discuss their breast health with their doctors, and it encourages young women to establish a baseline knowledge of how their breasts feel in order to improve their ability to detect changes in their breasts – a key method of detecting breast cancer. Some of the barriers to achieving these goals include negative body images among young women and fear and stigma that many young women associate with touching, looking at, or talking about their breasts.[4]

8. The Keep A Breast Foundation's "i ♥ boobies!" campaign is designed to reach young people by employing commonplace language that young people will find natural and non-threatening.[5] It uses the heart graphic because that is a common symbol for "love", and the theme of loving one's body is an important part of the Foundation's message.[6] The Keep A Breast Foundation did not intend for the phrase "i ♥ boobies!" to be sexual.[7] Rather, by associating

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[2] N.T. 93:14-95:22, 96:24-97:7, 97:21-22, 98:5-8, 107:11-14, 109:16-20.

[3] N.T. 105:21-23; *see also* N.T. 107:4-11 ("we're a youth-based nonprofit so we always want to interact with young people, people [whose] voices might not be heard by other breast cancer foundations.").

[4] N.T. 98:9-99:1, 99:6-15, 120:16-121:2.

[5] *See* N.T. 100:13-19 (explaining that word "boobies" is "commonplace"); N.T. 116:2 (describing "i ♥ boobies!" as a "very young sounding campaign"); N.T. 100:17 (explaining that "boobies" is a word that people are comfortable using to describe breasts to babies); N.T. 116:1-8 (same).

[6] N.T. 98:9-15, 99:16-20.

[7] N.T. 100:9-12, 101:15-23, 113:17-114:3.

"boobies" with the concept of love, the language of the "i ♥ boobies!" campaign takes aim at negative body images and taboos about self-touching and encourages women to appreciate and actively care for their breasts. [8]

9. The "i ♥ boobies!" bracelets serve as an awareness and fundraising tool.[9] The Foundation carefully controls the distribution of the bracelets to reach its target demographic and to ensure that wherever the bracelets are sold, the campaign's message will be properly communicated to the purchaser and the purchaser will have access to the Keep A Breast Foundation's educational materials.[10] In addition to making educational literature available at bracelet purchase points, the Foundation raises awareness through the bracelets themselves, which encourage the wearer to learn about breast cancer and breast health. (N.T. 109:21-110:11.) The words "KEEP A BREAST" and the Foundation's web address are printed on every bracelet, directing the wearer to a wealth of information about breast cancer, prevention, and detection. [11] Some of the bracelets say "check y♥ur self!!", which serves as a reminder to perform regular breast self-exams. (N.T. 109:21-110:4.) The bracelets are also intended to start conversations among young people – not only to facilitate the sharing of information about breast cancer, but to help overcome fear and taboo associated with discussing breast health.[12]

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[8] N.T. 98:9-99:1, 99:4-22, 120:16-121:2.

[9] *See* N.T. 116:18-117:9 (bracelets are a tool for disseminating information); N.T. 121:8-13 (bracelet sales support "foundation as a whole" including staff salaries).

[10] N.T. 96:4-20, 101:24-102:6, 102:14-103:13.

[11] N.T. 109:25; *see also* Pls.' Ex. 39; Pls.' Ex. 40; Pls.' Ex. 41; N.T. 96:24-97:7 (describing information on blog).

[12] *See* 109:21-110:4 (engaging people in conversation about the bracelets is one means of

10. Neither B.H. nor K.M. considers “boobies” to be an offensive or vulgar term.[13] B.H. and K.M. and their peers and families – including a friend of B.H.’s grandmother who suffered from breast cancer – commonly use the term “boobies” to refer to their own and other women’s breasts.[14]

11. Neither B.H. nor K.M. interprets the phrase ““i ♥ boobies!” as a sexual double entendre, or believes that the bracelets could be construed to have any sexual meaning.[15] B.H. explained that the text on the bracelets that says “KEEP A BREAST”, a reference to breast cancer awareness and to the Keep A Breast Foundation, makes the breast cancer context of the bracelets clear.[16]

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education); N.T. 116:18-117:9 (people can learn about breast cancer by visiting KAB’s website or talking with someone who is familiar with it – for example, someone wearing a bracelet); N.T. 98:16-17 (“i ♥ boobies!” bracelets “break down the stigma of breast cancer, allowing something that’s so taboo and so scary to be engaging”); N.T. 99:4-15 (use of word “boobies” removed “fear” out of discussion of breasts and breast cancer).

[13] *See* B.H. Dep. 45:13-15 (when asked if she could understand how someone might find the bracelets offensive, responding, “Not really.”); N.T. 81:11-12 (K.M., testifying that “the word boobies doesn’t offend me at all.”); K.M. Dep. 31:24-32:1 (testifying that she did not think the word “boobies” was “inappropriate”); *cf.* N.T. 88:6-10 (K.M. testifying that there may be different synonyms for breasts that are “gross” and that she would want used to refer to her breasts).

[14] N.T. 25:21-25, 26:19-27:1 (B.H. testifying); N.T. 61:2-9 (K.M. testifying); *see also* N.T. 87:14-21 (K.M. testifying that, to her knowledge, “boobies” is “a regular proper formal English word”).

[15] *See* N.T. 40:8-10, 49:25-50:19 (B.H. testifying); N.T. 83:16-24 (K.M. testifying); B.H. Dep. 45:21-23, 64:9-15, 75:7-21.

[16] *See* N.T. 49:25-50:19 (B.H., testifying that the phrase “i ♥ boobies!” could not be interpreted to refer to sexual attraction to breasts because each bracelet “says ‘KEEP A BREAST’ on it which is standing for breast cancer, so I don’t see a double meaning.”); B.H. Dep. 45:21-23 (observing that “the bracelets [say] Keep a Breast on them, so it’s telling you what they’re for.”); B.H. Dep. 75:7-21 (bracelets that “have the Keep a Breast words on it […] mean […] standing

12. B.H. purchased her first “i ♥ boobies!” bracelet at the end of summer in 2010, before the beginning of the school year. (N.T. 22:12-13). She had previously seen the bracelets on friends and on other people at the mall, and had asked her friends about the purpose of the bracelets. (N.T. 22:13-15, 41:20-23, 42:12-18.) She then learned more about the Keep A Breast Foundation through in-store displays and the Foundation’s website. (N.T. 42:12-25.) She and her mother sought out the bracelets, making multiple attempts to find them in stores. (N.T. 22:15-21, 23:4-17.) After purchasing the bracelets, B.H. wore them every day, up until her suspension. (N.T. 26:1-5, 27:20-22.)

13. By purchasing and wearing the bracelets, B.H. wanted to show her support for breast cancer prevention, raise awareness and initiate dialogue about breast cancer, and support the Keep A Breast Foundation’s breast cancer prevention programs.[17] B.H. also wanted to honor a close friend of the family who survived the disease after undergoing a double mastectomy. (N.T. 25:1-20, 37:1-6, 43:1-10.)

14. K.M. first learned about the “i ♥ boobies!” bracelets over the summer of 2010 from B.H. Before the school year started, K.M. and her mother travelled to the mall to purchase an “i ♥ boobies!” bracelet for K.M. She and her mother later purchased several more bracelets. After purchasing the bracelets, K.M. wore them every day, up until her suspension. (*See* N.T. 55:25-56:20, 58:25-59:12.)

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up for, like, the cancer and raising awareness.”).

[17] *See* N.T. 22:25-23:4 (B.H. testifying that she wanted to financially support KAB’s awareness campaigns); N.T. 23:22-24:1 (“I believe like people when they see it, […] I could influence them to be aware of breast cancer and buy bracelets and raise money for the Foundation.”).

15. K.M. wanted to wear the bracelets to show her concern about breast cancer and to honor the memory of her deceased great aunt, who had breast cancer. (N.T. 56:9-58:9.) After purchasing the bracelets, K.M. sought out more information about breast cancer, and learned that the youngest girl diagnosed with breast cancer was only ten years old. (N.T. 60:4-61:1.) She also learned about breast cancer risk factors, the effects of breast cancer, and how to check yourself for lumps. (N.T. 73:25-74:10.) She learned about her great aunt who had breast cancer and that breast cancer "can run in the family." (N.T. 91:22-92:6.) K.M. testified that she would not have learned this information about breast cancer if she hadn't purchased the "i ♥ boobies!" bracelets. (N.T. 91:22-92:6.) She wants to continue to wear the bracelets at school to draw attention to the issue of breast cancer, to demonstrate her own concern about the issue, and to promote education about breast cancer. (N.T. 77:2-10.) She believes that an understanding of breast cancer issues is important for people of "any age." (N.T. 77:10.)

16. Neither B.H. nor K.M. feels that simply wearing pink clothing or ribbons conveys the same meaning as wearing the "i ♥ boobies!" bracelets. B.H. testified that she thinks pink does not grab the attention of young people as much as the "i ♥ boobies!" bracelets, and that people do not necessarily interpret pink clothing or ribbons as symbolic support of breast cancer awareness.[18] K.M. testified that wearing pink did not draw attention to the issue of breast cancer

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[18] N.T. 24:12-23 (B.H. testifying); *see also* B.H. Dep. 42:4-12 (testifying that "I don't know if, like, everyone, like, gets the whole, like, wear pink thing […] It's kind of like [an] old type thing."); B.H. Dep. 63:21-64:8 (testifying that she thought the "i ♥ boobies!" bracelets were "more effective […] because when you wear it, people see it, like because it's on your wrist. And […] it appealed to younger kids and teenagers.").

the way that the "i ♥ boobies!" bracelets did because pink is "just a color" and does not start conversations about breast cancer or adequately "give attention to" the issue of breast cancer.[19]

The History of the Bracelets at Easton Area Middle School

17. The "i ♥ boobies!" bracelets have been popular among Easton Area middle schoolers since the start of the Fall 2010 term,[20] which began on August 30, 2010.

18. B.H.'s "i ♥ boobies!" bracelets have caused people to ask her about the purpose of the bracelets, but they have not provoked any offensive or negative comments or inappropriate jokes about "boobies".[21] K.M. also testified that a lot of people asked her about the bracelets and that the bracelets drew the attention of "most of the students in [her] school[.]" (N.T. 65:4-24.)

19. Since wearing the "i ♥ boobies!" bracelets, B.H. has learned of more people – including teachers and friends at school – who have lost family members to breast cancer, because wearing the bracelets leads to conversation about the disease. (N.T. 39:4-40:7.)

20. In mid- to late-September, a handful of the 120 teachers in the EAMS 7-8 building spoke to Ms. Braxmeier about the "i ♥ boobies!" bracelets, seeking instruction on how they

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[19] N.T. 64:25-66:4; *see also* N.T. 79:10-16 (K.M., testifying that she "didn't think that pink was enough of an expression"); K.M. Dep. 61:20-62:2 (observing that the only school-sanctioned form of expression about breast cancer was wearing pink, and that teachers' pink T-shirts "did not have any kind of word [for] breast on it" and that she had no idea whether anyone would understand that the T-shirt was about breast cancer).

[20] *See* N.T. 41:20-42:5 (B.H., testifying that there were "a lot of eighth grade kids wearing them"); B.H. Dep. 21:22-22:5 (when asked how many girls she knew were wearing the bracelets, B.H. testified that there were "too many to count"), B.H. Dep. 25:9-25 (B.H., naming seven boys off the top of her head in the seventh and eighth grades who wore the bracelets); K.M. Dep. 26:10-12 (when asked how many boys she knew were wearing the bracelets, K.M. responded, "Like half my class.").

[21] N.T. 26:11-18; B.H. Dep. 44:4-7.

should be handled.[22] Mr. Viglianti, Ms. Braxmeier, and Ms. DiVietro conferred and agreed that the bracelets should be prohibited,[23] but did not announce the ban to the students at that time. (See *infra* at p. 14 ¶ 24.)

21. Neither Mr. Viglianti, Ms. Braxmeier, nor Ms. DiVietro had, by September 23, heard any reports of disruption or student misbehavior linked to the bracelets.[24] [25] Nor had any of

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[22] N.T. 178:20-179:4, 190:11-16.

[23] N.T. 179:3-12 (Braxmeier testifying); Viglianti Dep. 44:13-45:11; DiVietro Dep. 39:1-10. Their supervisor, Mr. Furst, was not involved in this decision, and was not made aware of the decision until October 29. (N.T. 154:6-8, 159:3-12, 161:21-162:9.)

[24] N.T. 132:10-14 (Viglianti, testifying that he was not aware of any incident of inappropriate student behavior concerning the bracelets prior to Sep. 23); Viglianti Dep. 98:18-24 (testifying that he was not aware of any disruptions caused by students wearing the bracelets prior to Sep. 23); Braxmeier Dep. 29:14-18 (testifying that she was not aware of any incidents of sexual harassment or inappropriate use of the word "boobies" at time of ban); N.T. 210:13-21 (DiVietro, testifying that teachers had told the administrators that "it wasn't a disruption at that point, but it could be a concern"); DiVietro Dep. 39:11-16 (testifying that she was not aware of any disruption caused by the bracelets prior to September 23).

[25] At the evidentiary hearing, Ms. DiVietro seemed to testify that she was aware on September 23 that her assistant principals had received reports of incidents of disruption caused by the bracelets from one or more teachers. (N.T. 211:4-9 (DiVietro, testifying that one teacher reported disruption, and stating that she had "some information that there had been some disruption" at the time of the decision to ban the bracelets).) However, this is not consistent with either Ms. DiVietro's testimony at her deposition or with the testimony of Mr. Viglianti and Ms. Braxmeier. (*Compare* N.T. 238:25-239:18 (DiVietro, recognizing that her testimony before the court contradicted the testimony she gave at her deposition) *with* N.T. 132:10-14 (Viglianti testifying); N.T. 178:20-179:4 (Braxmeier testifying); DiVietro Dep. 39:13-18 (testifying that she was not aware of any disruption caused by the bracelets prior to Sep. 23).) Later in the evidentiary hearing, she admitted that at the time of the decision to ban, she did not have evidence that the bracelets had already caused disruption, but rather, had heard concerns that the bracelets might cause disruption. (N.T. 241:17-242:17.)

the principals then heard reports of inappropriate comments about "boobies".[26] Mr. Viglianti admitted that, at the time of this decision, he had not even seen the bracelets. (N.T. 132:10-25.)

22. The three principals offered various reasons for their decision in September to ban the bracelets:

a. Mr. Viglianti testified that the administrators' decision to ban the bracelets was based on the term "boobies", which was "not appropriate". (Viglianti Dep. 50:1-10.) He thought some of the middle school students were not mature enough "to understand and see that [as] appropriate", and he was concerned that the use of the word "boobies" in the bracelets would cause students "to start using the word just in communication with other students, talking with other students."[27] He testified that the word "boobies" was "vulgar," based on his understanding that "vulgar" means "slang". (N.T. 128:16-19; Viglianti Dep. 31:1-13.) Although Ms. Braxmeier and Ms. DiVietro did not cite the word "boobies" on its own as the basis for the ban, they agreed that the word is vulgar.[28]

b. At his deposition, Mr. Viglianti also testified that it would be similarly inappropriate for either the word "breast" or the phrases "keep-a-breast.org" or "breast

[26] N.T. 132:10-17 (Viglianti testifying); Braxmeier Dep. 29:14-18 (testifying that she was not aware of any incidents of sexual harassment or inappropriate use of the word "boobies" at time of ban); DiVietro Dep. 39:13-44:4 (testifying that there was no reported disruption prior to Sep. 23, and describing reports of inappropriate comments about "boobies" that all occurred after Sep. 23).

[27] Viglianti Dep. 50:18-22, 52:5-10.

[28] Braxmeier Dep. 11:22-12:12:10 (word "boobies" is vulgar and slang); DiVietro Dep. 51:10-12 ("boobies" is a vulgar term); *see also* DiVietro Dep. 20:1-12 ("boobies is not […] an appropriate terminology to use and display in the middle school level" and that "it could be a vulgar term."); DiVietro Dep. 25:1-4 (term "boobies" is "not a state-approved terminology in our health curriculum").

cancer awareness" to be displayed on clothing in the middle school.[29] During the course of the evidentiary hearing, he changed his mind. (*See* N.T. 124:18-125:21.) Ms. DiVietro also equivocated as to whether clothing bearing the words "breast cancer awareness" or "keep-a-breast.org" would be permissible on student clothing. At her deposition, she testified that the words "keep-a-breast.org" are offensive, vulgar, and "not acceptable" for middle schoolers because the word "breast" "can be construed as a sexual connotation."[30] At the evidentiary hearing, she also reconsidered this position.[31]

c. Ms. Braxmeier and Ms. DiVietro testified that the bracelets violate the Middle School dress code because of the phrase "i ♥ boobies!" rather than simply the word

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[29] Viglianti Dep. 18:3-19:1 (opining that the word "breast" on an article of clothing would violate the dress code); *id.* 20:12-23 (explaining that the word breast is "not appropriate" because "the color pink is the way to show support for […] breast cancer awareness, so the word is not permissible."); *id.* 24:14-21 (testifying that he would have suspended a student who refused to remove a T-shirt that said "breast cancer awareness" because "the word 'breast' is inappropriate for middle school students."); *id.* 35:2-14 (testifying that he would not allow students to wear the bracelets inside out, displaying the phrase "keep-a-breast.org", because "students in the seventh and eighth grade […] just at times cannot handle those types of words in an open forum."); *id.* 35:15-23 (explaining that word "breast" was permissible in a sexual education curriculum because "a trained professional is supervising the students on the context there"); *id.* 81:2-4 (testifying that phrase "Keep A Breast" not appropriate to display on bracelets); *see also* N.T. 124:18-125:7 (confirming deposition testimony).

[30] DiVietro Dep. 23:4-25; *see also* DiVietro Dep. 51:24-52:2 (testifying that bracelet that just said "Keep a Breast" would not be appropriate for middle schoolers).

[31] *See* N.T. 229:3-230:23 (DiVietro, concluding, "Breast cancer awareness, when it's done in appropriate forums such as the classroom setting in a health curriculum – you know, in an educational setting, yes, that is appropriate."); N.T. 242:18-243:3 (DiVietro, testifying that she would not have banned "breast cancer awareness" on a T-shirt).

"boobies".[32] Specifically, they understood the phrase "i ♥ boobies!" as an impermissible "double entendre"[33] about sexual attraction to breasts.[34]

d. All of the principals expressed concern that the bracelets might cause some students to engage in sexual harassment.[35]

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[32] *See* Braxmeier Dep. 46:15-18 (ban based on phrase, not the word); Braxmeier Dep. 46:24-47 (same); DiVietro Dep. 16:2-19, 17:3-5 (ban based on the phrase); DiVietro Dep. 50:19-22 (when asked whether plaintiffs were suspended for using a vulgar term, Ms. DiVietro responded, "they were wearing the bracelet that we considered a vulgar statement, 'I heart boobies'").

[33] *See* Braxmeier Dep. 93:15-94:2 (citing provision of dress code prohibiting "clothing imprinted with […] double entendre pictures or slogans, including those relating to alcohol, tobacco, drugs, weapons, and violent acts.").

[34] N.T. 179:15-22 (Braxmeier, testifying that "[t]he term, 'I (Heart) Boobies' or 'I Love [Boobies]' definitely has a double entendre to it. It definitely has a sexual meaning to it and in our school we don't permit students to have apparel with sexual meanings attached to them[.]"); N.T. 188:22-189:2 (Braxmeier, testifying that "we found the phrase, the actual phrase 'I (Heart) Boobies' or 'I Love Boobies' to have a sexual meaning in the middle school [context] that could be viewed that way by the students, by many of the students, both male and particularly – well, particularly male, as well as female."); N.T. 210:21-23 (DiVietro, testifying that bracelets were inappropriate given the middle school "context"); N.T. 211:14-23 (DiVietro, testifying that "my concern is the double meaning, as you state, the double entendre, and not all students may understand that it's just for breast cancer support because the 'I (Heart) Boobies' statement can be taken in a sexual connotation, especially at this grade level. Some kids are not mature enough to handle that."); N.T. 214:12-24 (DiVietro, explaining "I don't believe that every student in the middle school would be buying these just because of breast cancer awareness. Yes, some would but others, it's a fad, it's something fashionable. The kids want to wear it. […] I don't know that they all did research like these young ladies here to know really what the background of it is and some children – and they have taken it – they took it out of that context, the breast cancer awareness [context] and can use it as a sexual connotation, 'I love your boobies,' and not […] really understanding the true meaning."); Braxmeier Dep. 10:7-14 (testifying that the phrase "i ♥ boobies!" is vulgar in the context of the bracelets to middle school students); Braxmeier Dep. 12:12-15 (same); DiVietro Dep. 16:5-7, 16:14-16 (testifying that "the way that it's stated, I heart boobies, I love boobies" is "inappropriate at that age level" because "[i]t has a double meaning."); DiVietro Dep. 19:22-24 (testifying that the phrase "I love boobies" was a sexual innuendo).

[35] DiVietro Dep. 22:3-11 (testifying that concern about "students touching other students or students saying things to other students" was "why we banned them"); DiVietro Dep. 20:14-18 ("we have children that are offended by it when […] boys come up to other girls and say 'I love

e. In addition, Ms. DiVietro testified that the bracelets sent students the wrong message regarding socially appropriate behavior and statements.[36] She added that while the school administrators "don't have the right to say what [students] can or cannot wear" outside of school, "inside the school we have to regulate these types of things." (N.T. 226:1-4.)

f. Finally, Ms. DiVietro testified that allowing students to wear the Keep A Breast Foundation's "i ♥ boobies!" bracelets would diminish her authority to prevent students from wearing clothing with other statements that the administrators deemed inappropriate.

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your boobies, I heart your boobies' (descriptive gesture) and go after them"); DiVietro Dep. 21:18-24 ("I also have to consider the sexually abused children […] [W]hat if a boy came up to her and touched her on the breasts and said I heart your boobies[?]"); N.T. 223:15-224:2 (DiVietro, testifying that, "if kids aren't – some of the kids aren't taking it seriously as we – as was noted, as we heard here, and they can be very offensive to those students that they walk up to and say I love your boobies and touch them"); N.T. 232:21-233:4 (DiVietro, stating, "our concern is we didn't want […] kids thinking that […] it's acceptable to go up to girls, [saying] 'I love your boobies,' you're wearing the bracelet."); N.T. 202:4-9 (when asked whether she was concerned that the bracelets could provide an excuse for middle school boys to approach girls and say 'I love your boobies', Braxmeier responded, "It can be."); N.T. 133:17-25 (Viglianti, testifying that some of the middle school students "would not be able to handle" the "terms" on the bracelet and would "do things that were inappropriate"); Viglianti Dep. 52:10-15 (testifying that "some students would have used [the word "boobies"] in an inappropriate way and started saying things to some of the female students in our school, making reference to their […] breasts.").

[36] N.T. 225:13-24 (DiVietro, testifying that the bracelets sent students the wrong message about "acceptable behavior and statements to be wearing out in society. That's not what we're trying to educate our children to do."); DiVietro Dep. 70:19-22 ("I'm telling you what […] our decision was based on [:] it's an inappropriate statement to wear at that age level."); *see also* DiVietro Dep. ("It's not appropriate terminology. It's the wrong context to be wearing I heart boobie bracelets. And I heart boobie T-shirts is inappropriate[.]") In particular, Ms. DiVietro noted that one teacher found the bracelets offensive because they did not treat the issue of breast cancer sufficiently "seriously". (N.T. 214:3-9 (DiVietro, testifying that a teacher was "very offended about the kids coming in and making light of the whole thing with these – with these 'boobie' bracelets and she found it very offensive […] that they're not taking it seriously.").)

(*See* N.T. 211:23-212:1, 224:14-226:19.) She explained that banning the "i ♥ boobies!" bracelets "makes a statement that we as a school district have the right to have discretionary decisions on what types of things are appropriate and inappropriate for our school children." (N.T. 228:5-10.)

23. The justification for the ban as explained by the three administrators at their depositions and the hearing in December differs from the justification first articulated by EASD in its November 9, 2010 letter to Plaintiffs' counsel. In that letter, EASD claimed that it banned the bracelets because some middle school students are uncomfortable with discussion of the human body; some male middle school students had made embarrassing comments to female students about their breasts; the students who defied the ban were then observed 'high-fiving' each other in the cafeteria; and some Middle School teachers believe the bracelets trivialize the subject of breast cancer and are personally offended by the bracelets' "cutesy" treatment of the disease. (Compl. ¶ 29; Answer ¶ 29.)

24. The principals did not tell the students in September about their decision to ban the bracelets. (*E.g.,* Viglianti Dep. 54:13-21.) Instead, on September 23, 2010, Mr. Viglianti sent an email to the staff of the 7-8 building that stated: "If students are wearing any wristbands that have the word 'boobie' written on them please ask them to remove the band and keep it at home. They can instead wear pink on October 28th when the entire district will be wearing pink to recognize[e] Breast Cancer Awareness Month." (Pls.' Ex. 1; Viglianti Dep. 41:7-6.)

25. After September 23, students continued wearing the bracelets. Toward the end of October – Breast Cancer Awareness Month – a teacher reported that "[w]e are constantly asking students to remove the 'I Love Boobie Bracelets!'" (*See* Def.'s Ex. 9 (Oct. 27 email from Green-

Catalano to Viglianti).) On October 27, the administration sent another email to teachers asking them to enforce the ban. (*See* Pls.' Ex. 1 at p.3 (Oct. 27 "Wrist Bands" email from DiVietro). In response, Ms. DiVietro received an email from a teacher asking that the administration announce the ban to the students directly. (Pls.' Ex. 3 (Oct. 27 email from Sanal to DiVietro).)

26. The school finally announced the ban to students in the seventh and eighth grades on the afternoon of October 27, more than eight weeks after classes began. Toward the end of the school day, at the request of Ms. DiVietro, Mr. Viglianti read a prepared statement over the PA system.[37]

27. The next day, the school had a student deliver a prepared statement written by the school during the morning announcements on the school's TV station.[38] The TV announcement about the bracelet ban contained the word "boobies." (N.T. 63:3-5 (K.M. testifying).)

28. On October 27, B.H. wore her bracelets to school. During lunch, a cafeteria monitor noticed her bracelets and summoned the security guard, Mr. Border. B.H. admitted that she was wearing a bracelet but refused to remove it, so Mr. Border escorted her to Ms. Braxmeier's office. Ms. Braxmeier told B.H. that "the bracelets are not appropriate to be worn in school". B.H. removed the bracelet, and was then allowed to return to the cafeteria without

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[37] N.T. 218:6-9 (DiVietro testifying); Viglianti Dep. 66:13-22; *see also* Pls.' Ex. 1 at p.4 (Oct. 27, 2010 email from DiVietro requesting announcement).

[38] Viglianti Dep. 60:24-61:16; Pls.' Ex. 1 at p.3 (note indicating "TV announcement 10/28"); *see also* Braxmeier Dep. 87:14-19 (describing *id.*); N.T. 63:17-64:19 (K.M., testifying that a student read a statement written by school); Viglianti Dep. 54:22-55:13 (testifying that he believes there was an announcement made through TV station towards end of October).

punishment.[39] The bracelets had not caused any disruption in the cafeteria. (N.T. 175:2-8 (Border testifying).)

29. That day after school, B.H. told her mother that the "i ♥ boobies!" bracelets had been banned and asked permission to wear her bracelets despite the ban. She wanted to continue wearing the bracelets because she thought her freedom of speech encompassed the right to wear a bracelet raising awareness of breast cancer. Her mother agreed. (N.T. 31:11-32:6.)

30. K.M. also told her mother of the ban on the "i ♥ boobies!" bracelets and was given permission to wear her bracelets on the school's Breast Cancer Awareness Day. (N.T. 66:5-15.)

The Suspensions

31. Thursday, October 28, 2010 was Breast Cancer Awareness Day at the Easton Area Middle School. The school encouraged students to wear pink that day to demonstrate support for breast cancer awareness.[40] The school solicited donations from teachers for the Susan G. Komen Foundation's "Passionately Pink for the Cure" breast cancer campaign, and teachers who donated received a pin bearing the name of that campaign or a "Real Rovers Wear Pink" T-shirt that they could wear to school on Breast Cancer Awareness Day.[41] Neither the T-shirts nor

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[39] N.T. 170:8-171:15, 172:4-8 (Border testifying); N.T. 183:13-24, 184:1-2 (Braxmeier testifying).

[40] Pls.' Ex. 1 at p.3 (email directing teachers to tell students that instead of wearing the i ♥ boobies!" bracelets, they can wear pink on Breast Cancer Awareness Day); Def.'s Ex. 1-2 (same); N.T. 51:7-9 (B.H. testifying); N.T. 76:17-22, 79:10-16 (K.M. testifying).

[41] *See* N.T. 158:12-17, 188:5-13, 218:25-219:19; Viglianti Dep. 16:19-17:3; B.H. Dep. 27:2-28:6 (testifying that one day teachers wore "Real Rovers Wear Pink" T-shirts); K.M. Dep. 29:11-22 (same). The school did not make these breast cancer awareness pins or T-shirts available to students. (N.T. 195:10-20 (Braxmeier, affirming that "none of the awareness avenues that were available to the faculty were also made available to the students"); K.M. Dep. 73:20-74:2.)

the pins contained the word "breast" or any synonym for breast.[42] The school did not conduct any educational programming about breast cancer that day.[43]

32. B.H. and K.M. wore their "i ♥ boobies!" bracelets to school on Breast Cancer Awareness Day. (N.T. 32:20-25 (B.H. testifying); N.T. 66:16-67:16 (K.M. testifying).) During K.M.'s fourth period class, her teacher saw her bracelets and told K.M. to roll down her sleeves to cover up the bracelets so she didn't get caught. K.M. kept her bracelets under her sleeves until lunch, when she rolled up her sleeves to avoid getting food on them. (N.T. 68:24-69:1 (K.M. testifying).)

33. Neither the girls nor their "i ♥ boobies!" bracelets disrupted any school activities that day.[44]

34. During Plaintiffs' lunch period, a cafeteria monitor observed that B.H. and K.M. were wearing the bracelets. She asked K.M. to take them off, and K.M. said no. The cafeteria monitor summoned a security guard, Mr. Border. Mr. Border asked B.H. whether she was

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[42] *See* Def.'s Ex. 24 (image of T-shirt text with "REAL ROVERS WEAR PINK TO SUPPORT THE FIGHTERS, ADMIRE THE SURVIVORS, HONOR THE TAKEN, AND NEVER GIVE UP HOPE" on the front and "GET YOUR PINK ON!" on the back); Viglianti Dep. 15:1-11 (reading text of pins: "Susan G. Komen, Passionately Pink for the Cure, www.passionatelypink.org" and "Passionately Pink for the Cure, a program of Susan G. Komen for the Cure").

[43] N.T. 76:14-16 (K.M. testifying); N.T. 126:18-23 (Viglianti testifying); DiVietro Dep. 32:2-8.

[44] *See* N.T. 173:10-18 (Border testifying); N.T. 32:20-33:7, 33:22-35:6, 35:10-21 (B.H. testifying); N.T. 67:14-69:10, 68:9-15, 69:2-10 (K.M. testifying); N.T. 139:12-140:1 (Viglianti, admitting that low-five did not cause disruption); N.T. 173:10-18 (Border, when asked whether the girls' lunchroom high-five caused a disruption, responding "no, no, nothing really"); N.T. 174:6-8 (Border, testifying that "there was no problem at all on the way to the office."); N.T. 175:9-13 (Border, testifying that there were no disruptions attributable to the bracelets on October 28).

wearing a bracelet, and B.H. admitted that she was, as did K.M. and another girl named Rachel.[45] Mr. Border allowed the girls to finish eating their lunches, then took them to Ms. Braxmeier's office. (N.T. 172:24-174:5 (Border testifying).)

35. Ms. Braxmeier spoke with each girl separately in her office. Rachel agreed to remove her bracelets, and was allowed to return to class without punishment. B.H. and K.M. each refused to remove her "i ♥ boobies!" bracelets.[46] B.H. explained to Ms. Braxmeier that the bracelet was "for breast cancer and [that] people in [her] family have been affected by breast cancer", and that "it was [her] freedom of speech to wear the bracelet."[47] K.M. explained to Ms. Braxmeier that she wanted to wear the bracelets because "it was Breast Cancer Awareness Day." (N.T. 70:13-18.)

36. Ms. Braxmeier conferred with Mr. Viglianti and Ms. DiVietro, and they agreed that B.H. and K.M. would be punished with an in-school suspension for the remainder of that day and for all of the following day.[48]

37. The Plaintiffs' families each received a letter notifying them of the girls' suspension and stating that the suspension was due to "disrespect," "defiance," and "disruption." (Pls.' Ex.

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[45] *See* N.T. 33:1-10 (B.H. testifying); N.T. 66:16-67:2 (K.M. testifying); N.T. 172:9-18, 173:19-25 (Border testifying).

[46] *See* N.T. 36:7-9, 36:19-20, 69:18-70:14; N.T. 184:16-185:1, 187:4-5, 187:13-21.

[47] N.T. 37:1-7; *see also* B.H. Dep. 59:10-17 (stating that she told Ms. Braxmeier that she was wearing the bracelet "because of breast cancer and I've known people that have suffered from it"); B.H. Dep. 63:9-20 (reading her own quote in an news article: "I believe everybody should be aware of breast cancer. I thought it was my freedom of speech to wear it, and I didn't think the school had the right to take that from me.").

[48] N.T. 36:19-22, 37:10-21, 71:15-72:10, 187:8-12, 187:25-188:4; Viglianti Dep. 90:1-20.

7; Pls.' Ex. 8.) Defendant has conceded, however, that Plaintiffs' only offense was refusing to remove the bracelets.[49]

Disruption Attributed To the Bracelets

38. In late October and mid-November, the middle school administrators received two reports of boys making inappropriate remarks about "boobies."

a. First, during Ms. Braxmeier's October 28 conversation with Rachel about her "i ♥ boobies!" bracelets, Rachel told her that she believed some boys had made remarks to girls about their "boobies".[50] When the school elicited a written statement from Rachel on November 15 (after receiving the Plaintiffs' November 4 letter demanding that the school lift the ban on Plaintiffs' bracelets), Rachel equivocated as to whether the incident involved multiple boys or just one boy, and stated that she did not know the student's name, so the school was never able to verify that an incident actually occurred.[51]

b. Second, on or about November 16, the middle school administrators received a report that two female students were discussing the "i ♥ boobies!" bracelets when a boy sitting with them at lunch interrupted them and made statements such as "I want boobies"

[49] *See* Braxmeier Dep. 43:14-46:21 (discussing suspension letters and explaining that B.H. and K.M. "were suspended for refusing to remove the bracelets."); N.T. 139:12-140:1 (Viglianti, explaining that "disruption" cited in plaintiffs' suspension letters was the low-fives, but admitting that they did not cause disruption).

[50] N.T. 181:2-5, 182:8-13; Braxmeier Dep. 13:1-10, 20:14-22.

[51] Def.'s Ex. 14 (Rachel's written statement); N.T. 194:15-25 (Braxmeier, testifying); *see also* Braxmeier Dep. 13:1-10 ("a boy […] or boys is what she said at the time").

and made inappropriate gestures with two fireball candies.[52] The administrators spoke with the boy, who admitted that he had said something inappropriate, and he was suspended for a day. (Braxmeier Dep. 14:24-15:3, 16:9-17:5.)

39. Ms. Braxmeier testified that, in October, there were also two incidents of inappropriate touching by middle school boys of eighth grade girls.[53] There is no evidence that either incident was caused by Plaintiffs' "i ♥ boobies!" bracelets, by speech similar to Plaintiffs' bracelets, or indeed, by speech of any kind. Ms. Braxmeier's only reason for identifying these incidents in connection with the bracelets is that they occurred at the same time the bracelets were on campus.[54]

40. All three principals admit that inappropriate sexual statements and touching are unfortunate but not unusual behavior by middle school boys.[55] Ms. Braxmeier admitted that sexualizing words is common among middle school students. (Braxmeier Dep. 56:4-17.) When asked whether she was surprised that some boys started using the words banned by the school, Ms. DiVietro responded, "I'm not surprised. The students are middle school students. You

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[52] Def.'s Ex. 15 (written statement of K.D.); N.T. 181:8-17, 195:1-4 (Braxmeier, testifying); Braxmeier Dep. 13:1-14, 14:2-8, 14:14-23, 15:7-23.

[53] Braxmeier Dep. 22:19-23:9; Def.'s Ex. 11 (report of Oct. 26 touching incident); N.T. 143:1-18 (Viglianti, reading *id.*).

[54] *See* N.T. 192:18-193:1-5; Braxmeier Dep. 25:1-11.

[55] *See* N.T. 145:24-146:7 (Viglianti, testifying that inappropriate touching would likely happen with or without the bracelets); N.T. 183:9-11 (Braxmeier, testifying that sexual curiosity was common among middle schoolers); N.T. 193:8-22 (Braxmeier, testifying that inappropriate touching has surely happened in prior years, and "very well could happen again"); DiVietro Dep. 46:6-19 (admitting that incidents of boys either making inappropriate remarks to girls about their breasts or touching them had happened at EAMS before the bracelets appeared on the scene).

know, it could happen before, it could happen after and it can still happen even though the ban is in effect. They are children and they are in middle school level and they do silly things, […] and they make the mistakes that we tell them not to do anyway. That's – you know, the level of the child or any – any human being." (N.T. 234:9-10; *see also* DiVietro Dep. 74:1-2 ("[I]t is the nature of a child at times to do things that are inappropriate and wrong.").)

41. B.H. and K.M. still want to wear their "i ♥ boobies!" bracelets.[56] They have been unable to wear the bracelets to school since October 28, 2010.

PROPOSED CONCLUSIONS OF LAW

Preliminary Injunction Standard

1. Under Fed. R. Civ. P. 65, this Court must weigh four factors when deciding whether to grant a motion for preliminary injunction: (1) has the movant shown a reasonable probability of success on the merits; (2) will the movant be irreparably harmed by denial of the relief; (3) will granting preliminary relief result in even greater harm to the non-moving party; and (4) is granting preliminary relief in the public interest. *American Civil Liberties Union v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (citations omitted). This Court finds that Plaintiffs have fully supported each of these factors and that a preliminary injunction should issue.

Plaintiffs are Likely to Succeed on Their Challenge to the Bracelet Ban[57]

[56] *See* N.T. 40:22-41:1 (B.H. testifying); N.T. 76:23-77:1 (K.M. testifying).

[57] Plaintiffs have also alleged that the District's policies are unconstitutionally vague and overbroad, but do not seek preliminary relief on the basis of those claims. Specifically, Plaintiffs challenge the provisions of the EAMS dress code that forbid clothing with "double entendre pictures or slogans" and clothing that is deemed to be in "poor taste". These prohibitions could

2. Although the Plaintiffs bear the burden of establishing the elements required for a preliminary injunction, in First Amendment cases the government bears the burden of establishing that its speech restrictions are justified. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") (citations omitted); *accord Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), the Supreme Court affirmed this burden shifting proposition for challenges to regulation of student expression in the school context. *Id.*, at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, *it must be able to show* that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.") (emphasis added). Therefore, once Plaintiffs have shown a restraint on protected expression, it is incumbent upon the District to bring forth evidence to justify that restraint under the relevant First Amendment standard.

3. Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Rather, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

4. In *Tinker*, the Supreme Court established the general rule regarding student

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encompass many puns or messages that, while not to the liking of school officials, are protected by the First Amendment.

speech:

> In order for the State in the person of the school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. ***Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.***

Id. at 510 (emphasis added).

5. Since *Tinker*, the Court has identified three categories of speech that fall outside of this analysis and, because of their unique effect on the school environment, may be punished or prohibited without regard to whether they cause disruption: speech that is offensively lewd and indecent, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); school-sponsored speech, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and speech that advocates illegal drug use, *Morse v. Frederick,* 551 U.S. 393, 403 (2007). "Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.).

6. The District has argued that the Plaintiffs' bracelets could be prohibited either under *Fraser*, as lewd and indecent speech, or under *Tinker's* substantial and material disruption standard. Neither standard justifies banning Plaintiffs' bracelets.

Regulation of Speech Under *Fraser*

7. The District, quoting *Fraser*, argues that "[t]he determination of what manner of

speech in the classroom or in school assembly is inappropriate properly rests with the school board." (Def.'s Mem. Opp. Mot for Preliminary Injunction at 10-11 (quoting *Fraser*, 478 U.S. at 684); *see also* N.T. 228:5-10 (DiVietro, testifying that banning the "i ♥ boobies!" bracelets "makes a statement that we as a school district have the right to have discretionary decisions on what types of things are appropriate and inappropriate for our school children").

8. The District overreads *Fraser*, and its own authority. The Supreme Court has made clear that school districts do not have the power, under *Fraser* or otherwise, to disallow speech in public schools simply because it is deemed "offensive" or "inappropriate". In *Morse*, Chief Justice Roberts explicitly rejected the district's attempt to expand *Fraser* in this manner:

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. See Reply Brief for Petitioners 14-15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.

Morse, 551 U.S. at 409. And Justice Alito, joined by Justice Kennedy, wrote separately to emphasize that his concurrence was conditioned on the majority's rejection of the idea that schools may regulate speech as they see fit:

> In addition to *Tinker,* the decision in the present case allows the restriction of speech advocating illegal drug use; ***Bethel School Dist. No. 403 v. Fraser,*** **478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program**; and *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988), allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.
>
> **The opinion of the Court does not endorse the broad argument advanced**

> **by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission."** See Brief for Petitioners 21; Brief for United States as *Amicus Curiae* 6. **This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs.**

Morse, 551 U.S. at 422-23 (Alito, J., concurring) (emphasis added); *see also Tinker*, 393 U.S. at 509 (school may not prohibit speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). *Fraser*, like the Supreme Court's other student speech cases, sets forth a specific category of student speech that may be regulated without regard to whether it causes substantial and material disruption; it does not give the District broad powers to allow or disallow speech on the basis of what it deems "appropriate".

9. *Fraser* announced the principle that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Fraser*, at 478 U.S. 682-83 (quoting *Thomas v. Board of Education, Granville Central School Dist.,* 607 F.2d 1043, 1057 (2d Cir. 1979)). In *Fraser*, the Supreme Court upheld discipline against a student who, at a mandatory school assembly, delivered a speech that was heavily and deliberately laden with "elaborate, graphic, and explicit sexual metaphor". *Fraser*, 478 U.S. at 678. The speech at issue in *Fraser* was not merely sexual and not age-appropriate for the entire audience – it was "obscene", *id.* at 679, "vulgar", *id.* at 684, "offensively lewd and indecent", *id.* at 685, and "plainly offensive to both teachers and students – indeed to any mature person." *Id.* at 683.

10. *Fraser* thus stands for the proposition that a school may proscribe student speech that is lewd, vulgar, indecent, and patently offensive to all audiences, regardless whether the speech poses a threat of substantial, material disruption to school activities. As then-Judge Alito

of the Third Circuit characterized it, "According to *Fraser*, then, there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school. *Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends' – a dichotomy neatly illustrated by the comparison between Cohen's jacket and Tinker's armband." *Saxe*, 240 F.3d at 213; *cf. Morse,* 551 U.S. at 422-23 (Alito, J, concurring) ("[*Fraser*] permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program").

11. *Fraser* also stands for the proposition that context matters. Fraser's speech did not contain profane words or words that were vulgar in and of themselves, yet the lewd meaning of the speech could not be mistaken. The record in *Fraser* reflected that both school officials and the students who heard the speech clearly recognized the "pervasive sexual innuendo" in the speech, and that Fraser intended that it be recognized. *Id.* at 684; *see also id.* at 681 (noting that plaintiff's use of sexual innuendo was deliberate). Finally, the speech in *Fraser* had precisely the impact that one would expect from the presentation of a graphic sexual metaphor in a school:

> During Fraser's delivery of the speech … [s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

Fraser, 478 U.S. at 678. These circumstances provide guidance for this Court's application of *Fraser.*

Application of *Fraser* to the "i ♥ boobies!" Bracelets

12. The "i ♥ boobies!" bracelets are a far cry from the deliberate and graphic sexual

metaphor at issue in *Fraser*. There is, of course, nothing inherently sexual or offensive in referring to or discussing women's breasts, nor is there anything inherently sexual or offensive in the word "boobies", which is a common slang term for breasts, particularly among children (and in this case a grandmother and her friends). And while "i ♥ boobies!" could be interpreted as a sexual statement, it is not obviously or necessarily one. Indeed, the phrase "I ♥ --" is commonly used as shorthand to express appreciation for locations, sports, pets and many other things, without any sexual meaning at all. Defendants have offered no evidence or reasoning to explain why, in this instance, the convention "I ♥ --" should be viewed as overtly sexual.

13. Moreover, there is no dispute that in this case, unlike in *Fraser,* Plaintiffs did not intend the bracelets to have a sexual meaning and did not do anything to suggest a sexual interpretation. Indeed, Plaintiffs rejected the idea that the bracelets could reasonably be interpreted in a sexual manner; as one of the Plaintiffs pointed out, the phrase "i ♥ boobies!" does not appear in isolation, but is invariably accompanied by the slogan "KEEP A BREAST", and often by other messages that have no apparent sexual meaning, but are associated with breast cancer awareness or the Keep A Breast Foundation.

14. There is, in short, nothing about the context or the manner in which Plaintiffs wore their bracelets that would change the innocuous text into the sort of offensive sexual metaphor banned in *Fraser*. Plaintiffs wore the "i ♥ boobies!" bracelets to express their support for breast cancer awareness, and confirmed that message through their conversations with peers, teachers and administrators. In fact, there is no evidence that *any* student who wore the bracelets presented "i ♥ boobies!" as a sexual message or, indeed, as anything other than a message about breast cancer awareness. Every bracelet includes the URL for the Keep A Breast website, thus

directly referencing that organization's breast cancer awareness and prevention campaigns.

15. Furthermore, it is clear that the "i ♥ boobies!" bracelets were not generally received as a sexual message, at least by the students, in contrast to the speech at issue in *Fraser*. There is no evidence that *any* Middle School student had used or remarked upon the bracelets in a sexual manner before the Middle School principals decided to ban the bracelets in September. And District officials received only two reports – over the course of an entire semester – of students making sexual comments that even arguably referenced the bracelets. While any word or phrase can be misused or misinterpreted – perhaps especially by Middle School students, as both sides contend – there is no evidence that most or even many of the students at the Easton Area Middle School 7-8 building interpreted the bracelets as a sexual message.

16. Moreover, the record belies the contention that District officials understood the bracelets to contain vulgar language or an overtly sexual meaning. The initial "ban" of the bracelets was not even communicated to the students, but instead left to haphazard enforcement by teachers. The bracelets remained, and even grew in popularity for another month before the Middle School principals announced and enforced the ban in late October. And the District's first defense of its ban did not characterize the bracelets as lewd, but instead as "cutesy", and potentially offensive to some students and teachers. If the Middle School officials truly believed the bracelets fell into the same category as the speech given in *Fraser*, it is difficult to imagine that they would have tolerated the widespread presence of the bracelets on campus for more than eight weeks, or that they would have directed student representatives to announce the ban on the TV station using the precise verbiage from the bracelets.

17. The District contends that it can require that students speak civilly, and that it is

the school's job to teach appropriate social behavior. But what is "civil" and "appropriate" is a matter of taste, as is evidenced by the Middle School principals' equivocation about whether the word "breast" should be banned in Middle School. The limits of student speech cannot be defined so subjectively. Nor is it the place of school officials to tell students to "wear pink", or to otherwise dictate how they express their concern about breast cancer.

18. There is, in short, nothing to bring the bracelets, as worn by Plaintiffs, within the ambit of that which "offend[s] for the same reasons that obscenity offends". *Saxe*, 240 F.3d at 213 (quoting *Fraser*, 478 U.S. at 685). The determination that speech is lewd and vulgar requires more than the *ipse dixit* of school officials – were it not so, *Fraser* would swallow the principle established in *Tinker* and reiterated in *Morse* that "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511. *Fraser* cannot justify Defendant's ban on Plaintiffs' "i ♥ boobies!" bracelets.

Regulation of Speech Under *Tinker*

19. *Tinker* involved middle and high school students who wore black armbands symbolizing their disapproval of the Vietnam War in order to make their views known to others at school, to encourage discussion about the war, and to influence others to adopt their views. *Tinker*, 393 U.S. at 514. The Court rejected the school officials' argument that they could punish the students who wore the armbands based on their opinion that certain subjects or controversial viewpoints are inappropriate topics of discussion for the halls of public schools. *Tinker*, 393 U.S. at 509 n.3, 510-11, 513. Instead, the Court held that "where there is no finding and no showing

that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Tinker*, 393 U.S. at 510.

20. Although school officials need not wait until speech has caused a substantial disruption in order to proscribe the speech under *Tinker*, they may only proscribe speech on the basis of its anticipated disruptive effect if their expectation of substantial disruption is "well-founded". *Sypniewski*, 307 F.3d at 253, 254 (quoting *Saxe,* 240 F.3d at 212). An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. As the Third Circuit has explained, "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Sypniewski,* 307 F.3d at 253.

21. A school official's expectation of substantial disruption will most likely be well-founded if it is based on past incidents arising out of similar speech. *Sypniewski*, 307 F.3d at 254-55 (citing *Saxe*, 240 F.3d at 212). Evidence that a student has worn a particular piece of expressive clothing "several times without incident […] speaks strongly against a finding of likelihood of disruption". *Sypniewski*, 307 F.3d at 254.

Application of *Tinker* to the "i ♥ boobies!" Bracelets

22. In this case, as in *Tinker*, "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Tinker*, 393 U.S. at 514.

23. The Middle School principals initially decided to ban the bracelets on September 23, without having heard a single report of student misconduct associated with the bracelets. The principals nonetheless claim that they feared the bracelets would spark disruption in the form of lewd remarks about girls' breasts. Defendant has offered no evidence that its administrators anticipated or had any reason to anticipate more than the usual level of inappropriate sexual behavior to result from the bracelets' message. The fact that Plaintiffs and others had been wearing the bracelets to school for several weeks at that time belies any "well-founded" basis for anticipating that they would cause disruption. *Sypniewski*, 307 F.3d at 254.

24. And even if the principals' fears had been well grounded, a small increase in the number of lewd remarks made by Middle School boys would not have amounted to "substantial and material disruption" of the sort that would justify suppressing speech. As all three of the principals testified, Middle School students always have and always will engage in inappropriate sexual statements and touching, with or without provocation. The fact that Middle School students can and will respond to innocuous objects, words or phrases with inappropriate sexual remarks does not make such remarks "substantially … disruptive" – it makes them routine. Unless such conduct rises to unprecedented levels that overwhelm ordinary disciplinary channels (and in this case the evidence shows that ordinary discipline was adequate to address the small number of alleged incidents), the sexual misbehavior of a handful of students cannot be considered "substantial and material disruption."

25. The courts have consistently rejected the idea that speech may be restricted because it could spark misbehavior – what is known as a "heckler's veto". This principle is applied in school, as well as other contexts. *See Tinker*, 503 U.S. at 508-09 (school officials may

not justify regulation of speech by their "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"); *United States v. Marcavage,* 609 F.3d 264, 282 (3d Cir. 2010) ("the Supreme Court and the courts of appeals have consistently held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity"); *Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359, 1373 (N.D. Fla. 2008) (school could not ban stickers, armbands t-shirts and buttons advocating equality for sexual minorities on the basis of a forecast of substantial disruption by opponents: "If a student's conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to punish the disruptive student, not the student whose speech is lawful."); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 849, 856-57 (E.D. Mich. 2003) (school could not ban shirt calling President Bush an "International Terrorist," where "there is no evidence that the t-shirt created any disturbance or disruption," even though another student confronted plaintiff in "angry" and "tense" way); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) ("There was no proof elicited during the hearing that, if the GSA Club were provided equal access, Defendants' ability to discipline any student who is disruptive would be diminished in any way. *Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.").

26. The District's approach would restrict the speech of girls who behave because of the anticipated conduct of boys who misbehave. School officials may not "sacrifice freedom upon the [altar] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob." *Holloman v. Harland*, 370 F.3d 1252, 1276 (11th Cir. 2004) (holding that "Even

if [a teacher] were correct in fearing that other students may react inappropriately or illegally, such reactions do not justify suppression of [student's].expression"). Because a heckler's veto cannot justify silencing speech, the Middle School principals' fears that the bracelets would spark routine and addressable misbehavior in other students cannot justify banning the bracelets.

27. The District's position becomes even less justifiable if evaluated at the time that Plaintiffs first learned of the ban, in late October. It is undisputed that students continued wearing the bracelets after the unannounced ban in late September – indeed, it was a teacher's complaint that ever more students were wearing the bracelets that sparked the decision to make a school-wide announcement about the ban. At that time, nearly two months after the bracelets appeared in the school, when the bracelets' popularity was at its peak, the Middle School administrators still had not heard a single report of misbehavior linked to the bracelets. The first such report came the day *after* the announcement of the ban, from Rachel, the third girl who was taken to Ms. Braxmeier's office on October 28. When Ms. Braxmeier later sought to follow up on that girl's report of boys making inappropriate remarks about girls' breasts, the girl revised her report to refer to a single incident in which the remarks came from a single boy, and she could provide no further information. A second incident was reported to the school in mid-November, and that boy was disciplined in the normal manner.

28. Defendant did not have a well-founded basis for believing that the "i ♥ boobies!" bracelets posed a risk of substantial, material disruption to the educational process or to other students' rights, nor did the bracelets, in fact, cause such disruption. Their prohibition, and the discipline against Plaintiffs, cannot be upheld under *Tinker*.

In The Absence Of Immediate Injunctive Relief, B.H. and K.M. Will Suffer Irreparable Harm

29. Because the Court finds that Plaintiffs are likely to succeed on their First Amendment claims, it follows that they will suffer irreparable harm in the absence of an injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also American Civil Liberties Union*, 217 F.3d at 180 (generally, in First Amendment challenges, Plaintiffs who meet the merits prong of the test for a preliminary injunction "will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.") (internal citation omitted).

30. It does not matter, as Defendant has argued, that Plaintiffs are free to wear pink ribbons or to express their support for breast cancer awareness and prevention in other ways. As long as their chosen expression is protected by the First Amendment, the deprivation of that expression is what matters, not the availability of other forms of expression that the District would prefer. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Defendant Will Suffer No Irreparable Harm by Allowing B.H. and K.M. to Wear Their Bracelets.

31. There is no evidence that Plaintiffs' bracelets will harm the Middle School or the District in any way. Any student who uses the phrase "i ♥ boobies!" in a lewd or harassing

manner could and should be disciplined. This Court's holding that Plaintiffs' use of the phrase cannot be punished does not immunize students who intentionally use the phrase – or other words – to impart sexual innuendo. Nor would it preclude the school from banning the bracelets, or any other clothing or decorations, if they were being used as gang symbols, as Defendant's counsel suggested at the evidentiary hearing.

32. Defendant has no legally-cognizable interest in suppressing this constitutionally-protected breast cancer awareness campaign, nor in keeping these girls from communicating with their peers about breast cancer in the words that they best understand. Indeed, such communication is an essential part of the educational process:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Tinker, 393 U.S. at 512-13 (internal citation omitted). Consequently, the District would suffer no harm by suspending the ban on the bracelets pending the outcome of this litigation.

The Public Interest is in Respecting Students' Constitutional Rights

33. Similarly, the Court must weigh the effect on the public of a suspension of the bracelet ban and the girls' return to school activities pending the outcome of the litigation. The public's interest is in respect for the First Amendment: "[i]n the absence of legitimate

countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997).

34. And in this case, there are other interests at stake. These bracelets have done precisely what they were designed to do: they have raised awareness about breast cancer, its effects on the students of the Middle School, and the importance of prevention for young women. Yet these socially conscious and serious girls have been punished – not because of their own conduct, but because administrators fear that boys will behave badly. The ban on the bracelets (1) deprives Easton Area Middle School students of an opportunity to learn from their peers about an important social issue and (2) sends the message that the commendable behavior of these girls is less important than the misbehavior of a few boys. That alone is reason to grant the requested injunctive relief.

35. This being a non-commercial case involving a relatively small amount of money, and the balance of hardships favoring the Plaintiffs, the Fed. R. Civ. P. 65(c) security bond requirement should be waived. *Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple University v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

Respectfully submitted,

Date: January 31, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served electronically upon all counsel through the Court's Electronic Filing system.

Date: January 31, 2011.

/s/ Mary Catherine Roper
Mary Catherine Roper